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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re
USA COMMERCIAL MORTGAGE
COMPANY,
USA CAPITAL REALTY
ADVISORS, LLC,
USA CAPITAL DIVERSIFIED
TRUST DEED FUND LLC,
USA CAPITAL FIRST TRUST
DEED FUND LLC,
USA SECURITIES, LLC,
Debtors.

Affects:

☒ All Debtors

: USA Commercial Mortgage Company
: USA Capital Realty Advisors, LLC
: USA Capital Diversified Trust Deed
Fund, LLC
: USA Capital First Trust Deed Fund,
LLC
: USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

(Jointly Administered Under
Case No. BK-S-06-10725-LBR)

**MOTION OF KREG ROWE ET. AL, TO
QUASH SUBPOENAS (INSOFAR AS
SUBPOENA SEEKS RECORDS OF THE
ABOVE LISTED ENTITIES AND
INDIVIDUALS) DIRECTED TO WELLS
FARGO BANK, N.A., WELLS FARGO
BANK OF NEVADA, NEVADA STATE
BANK, JP MORGAN CHASE, BANK OF
THE WEST, OPPENHEIMER FUNDS,
BANK OF AMERICA, CITY BANK, KREG
ROWE, BRETT SEABERT, OR IN THE
ALTERNATIVE, MOTION FOR
PROTECTIVE ORDER**

Hearing Date: June 15, 1007
Hearing Time: 1:30 p.m.

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1 Kreg Rowe et. al.¹ ("the Movants") file this Motion seeking to quash
 2 Subpoenas directed to Wells Fargo Bank, N.A., Wells Fargo Bank of Nevada,
 3 Nevada State Bank, JP Morgan, Bank of the West, Oppenheimer Funds, and
 4 Bank of America ("the Banks") and Kreg Rowe and Brett Seabert (the
 5 "Individuals"). This Motion is supported by the Declaration of Brett Seabert in
 6 support of the Motion, the pleadings previously filed in this case identified
 7 herein, the points and authorities below, and the exhibits attached hereto.

8 I. FACTUAL BANKGROUND

9 1. On January 8, 2007 this Court entered its Order Confirming the
 10 Debtors' Third Amended Joint Chapter 11 Plan of Reorganization as Modified².
 11 Pursuant to paragraphs 10 and 28 of the Plan on the Effective Date, all assets of
 12 the USACM Estate not collected or disposed of on or prior to the Effective date,
 13

14 ¹ McDonald Carano Wilson LLP's additional clients and Movants to this motion
 15 are: Brett Seabert, B & L Investments, Inc., Cabernet Highlands, LLC, Caughlin
 16 Club Management Partners, LLC, Caughlin Club Real Property Investors, LLC,
 17 CCRE Investors, LLC, Chardonnay Village Investors, LLC, Classic Residences,
 18 LLC, Comstock Village Investors, LLC, DDH Financial Corp, Diamond Village
 19 Investors 11, LLC, Diamond Village Investors 1 & 12, LLC, Double Diamond
 20 Homes, LLC, Double Diamond Management Company, LLC, Emigh Investments,
 21 LLC, Equus Management Group, Inc., Foothill Commerce Center, LLC,
 22 Homewood Village Investors I, LLC, La Hacienda Land Investors, Inc., Longley
 23 Town Centre, LLC, Longley Professional Campus, LLC, The Meadows Investors,
 24 LLC, Miners Village Investors, LLC, Monticello Investors, LLC, Mountainview
 25 Campus Investors, LLC, MP Tanamera, LLC, Pioneer Village Investors, LLC,
 26 Preserve at Galleria, LLC, Reno Corporate Center, LLC, Reno Design Center,
 27 LLC, Rowe Family Trust, RTTC Communications, LLC, Sandhill Business
 28 Campus, LLC, Sierra Vista Investors, LLC, South Meadows Commercial
 Property, LLC, South Meadows Office Investors, LLC, Sparks Galleria Investors,
 LLC, Sparks Galleria Investors II, LLC, Tanamera Commercial Development,
 LLC, Tanamera Corporate Center, LLC, Tanamera Development, LLC, Tanamera
 Homes, LLC, Tanamera Resort Condominiums, LLC, Tanamera Resort Partners,
 LLC, TCD Financial Corp, TCD Land Investments, LLC, Vineyard Highlands,
 LLC, The Vineyard Investors, LLC, Vineyard Professional Campus, LLC,
 Waterford Partners, LLC, Wyndgate Partners II, LLC, Wyndgate Village Investors,
 LLC, Michael Efstratis, Kraig Knudsen and Joe Lopez.

² Movants request the Court to take judicial notice of the Order and of the Third
 Amended Plan pursuant to Federal Rule of Evidence 201.

1 including all USACM Litigation Claims, minus any Cash needed to make
2 required payments, vested in the USACM Trust.

3 2. On March 6, 2007 and April 9, 2007, the attorneys for the USACM
4 Liquidating Trust ("the Trust"), filed several motions for Rule 2004 examinations.
5 Apparently, in response to the various Motions, Special Litigation Counsel for
6 the Trust, executed and served several twenty-four (24) page Subpoenas,
7 containing ninety-three (93) requests for documents maintained at **any** Wells
8 Fargo Bank branch and, upon information and belief, at any branch of Nevada
9 State Bank, JPMorgan Chase Bank, Bank of the West, Bank of Commerce,
10 Desert Community Bank, Oppenheimer Funds Citibank (Nevada), Bank of
11 America, N.A.³ (the "Banks") relating to **188 different companies/entities** and
12 **36 different individuals**, which included all the Movants. Although the
13 subpoenas were directed to the Banks, the information requested by the
14 Subpoenas includes the personal and private banking information of the
15 Movants. A true and correct copy of the Wells Fargo Subpoena is attached
16 hereto as Exhibit "A" and incorporated herein by reference. On April 26, the
17 Trust filed two additional Motions for 2004 Examinations of Kreg Rowe and
18 Brett Seabert. True and correct copies of the Rowe and Seabert subpoenas are
19 attached hereto as Exhibits "C" and "D".

20 3. In these motions, true and correct copies of which are attached
21 hereto as Exhibits B-1 through B-12, the Trust fails to explain to the Court, and
22 actually misleads the Court as to the purpose of the Rule 2004 examinations.
23 For example, in the Motion filed for examination of the Bank of America's
24 custodian of records, the Motion merely states:

25 The Movant seeks information concerning the *legal services* in
26 performed by BofA on behalf of USACM, the other debtors in the

27 ³ This motion does not seek to quash the subpoenas served upon Citibank, Desert Community
28 Bank, or the Bank of Commerce.

1 above-captioned cases (together with USACM, the "Debtors"),
 2 affiliates, subsidiaries, parents or otherwise related entities. The
 3 Movant seeks this information to assist in the collection of the
 assets of the investigation of the liabilities of the Debtors.

4 (*Id.*) (Docket No. 3389) (emphasis added).⁴ This same paragraph appears eight
 5 motions. (See Docket Nos. 3381-3389).⁵ None of these motions, however,
 6 included a copy or draft of the subpoena as an exhibit that was intended to be
 7 served in the event the motion(s) were granted.

8 4. On April 10, 2007 and April 20, 2007 the Court entered orders
 9 granting the Trust's Rule 2004 motions. Thereafter the first ten subpoenas to
 10 the banks (the "Bank Subpoenas") were served. Neither the Bank subpoenas nor
 11 the Motions and orders were provided to Movants at the time. The Bank
 12 subpoenas, as described above – are twenty-four (24) pages, containing ninety-
 13 three (93) requests for documents maintained at **any** of the bank branches
 14 listed for the various bank and financial institutions, relating to **188 different**
 15 **companies/entities** and **36 different individuals**. These subpoenas, like that
 16 subpoena described above, request vast amount of private and personal banking
 17 information of the Movants that are entirely unrelated Debtors in this case. In
 18 fact, the Subpoenas request *a vast array of records, the majority of which are*
 19 *unrestricted requests as to any subject matter and not restricted to anything*
 20 *having to do with the Debtor entities.*

21
 22
 23
 24 ⁴ It is unlikely that any of these banks provided "legal services" to USACM, which is the basis of
 25 the documents and the Rule 2004 examinations requested. Each of these entities is either a
 bank or banking institution.

26 ⁵ Note that Trust filed a Second Amended Motion regarding the Wells Fargo 2004 Examination,
 27 and that motion sought an examination regarding "financial services, wire transfers and other
 28 services." (Ex. B). Such amended motions were not filed with regard to the other financial
 institutions which are recipients of the abusive subpoenas.

1 5. For example, among other documents being sought, these
2 Subpoenas seek the following documents related to individuals, including from
3 the Movants:

4 3. Any and all documents evidencing any and all
5 accounts at Wells Fargo held in the name of or for the benefit of
6 any of the Individuals,

7 9. Any and all documents evidencing the
8 transactions and/or activity in the accounts at Wells Fargo held in
9 the name of or for the benefit of any of the Individuals.

10 12. Any and all documents evidencing the history of
11 the relationship between any of the Individuals and Wells Fargo.

12 43. Any and all documents evidencing loans or other
13 forms of credit extended to any person or company affiliated with
14 the Debtors, Entities, and/or Individuals by Wells Fargo and the
15 terms thereof.

16 54. Any and all documents evidencing wire transfers
17 received or sent by Wells Fargo with reference to any accounts at
18 Wells Fargo held in the name of or for the benefit of any of the
19 Individuals.

20 66. Any and all documents evidencing Wells Fargo's
21 knowledge of the sources and uses of funds deposited into any
22 accounts at Wells Fargo held in the name of or for the benefit of
23 any of the Individuals.

24 69. Any and all documents evidencing Wells Fargo's
25 knowledge of the business activities of any Individuals.

26 81. Any and all documents evidencing any
27 participation by Wells Fargo in any loans extended by any
28 Individuals to a third party.

(See, for example, Wells Fargo Bank, N.A. subpoena, attached hereto as Ex. A)
(each of the other subpoenas is identical in language and content).

6. The scope of the documents requested from the various banks and
financial institutions as to companies/entities, is equally as broad, including, for
example, the following:

2. Any and all documents evidencing any and all
accounts at Wells Fargo held in the name of or for the benefit of
any of the Entities.

8. Any and all documents evidencing the
transactions and/or activity in the accounts at Wells Fargo held in
the name of or for the benefit of any of the Entities.

11. Any and all documents evidencing the history of
the relationship between any of the Entities and Wells Fargo.

1 46. Any and all documents evidencing
2 correspondence and communications between any of the Entities
and Wells Fargo.

3 50. Any and all documents evidencing meetings
between Wells Fargo and any Entities.

4 53. Any and all documents evidencing wire transfers
5 received or sent by Wells Fargo with reference to any accounts at
Wells Fargo held in the name of or for the benefit of any of the
6 Entities.

7 65. Any and all documents evidencing Wells Fargo's
knowledge of the sources and uses of funds deposited into any
8 accounts at Wells Fargo held in the name of or for the benefit of
any of the Entities.

9 68. Any and all documents evidencing Wells Fargo's
knowledge of the business activities of any Entities.

10 80. Any and all documents evidencing any
11 participation by Wells Fargo in any loans extended by any Entities
to a third party.

(Id.)

12 7. As already indicated, these Bank subpoenas are not restricted to
13 documents and records pertaining to transactions related to the five Debtor
14 entities.

15 8. The subpoenas to Kreg Rowe and Brett Seabert (the "Individual
16 subpoenas") which were not even mentioned in the 2004 Motions, treat Row and
17 Seabert as "Corporate Representatives" and require them to produce documents
18 for the same 188 entities. None of the entities were subpoenaed.

19 9. The Debtors never had an ownership interest in any of the Movant
20 companies. (Brett Seabert Decl., Ex. C). Rather, USA Investment Partners, LLC
21 ("USAIP"), which is not a Debtor in this action, has or had an ownership interest
22 (directly or indirectly) in only 13 of the 51 Movant companies.⁶ USAIP is an
23
24
25
26

27 ⁶ Movants are informed and believe that USAIP has pledged such membership interests to
28 USACM as collateral for a note which is currently not in default.

1 alleged debtor in an involuntary Chapter 11 proceeding, Case No. 07-11821-
2 LBR, filed before this court.⁷

3 10. For example, Seabert Declaration identifies many Movant entities
4 that never received a loan or any type of funding from USACM and many entities
5 in which USAIP has never been an owner or member.
6

7 11. However, regardless of their relationship with USACM or USAIP,
8 none of the Movants should not be subject the intrusive subpoenas into their
9 personal financial data.⁸

10 12. The subpoenas also go so far as to seek the personal financial
11 records of several employees of the Movant entities. Movants Kreg Rowe, Brett
12 Seabert, Kraig Knudsen, Joe Lopez and Mike Efstratis are employed by
13 Tanamera Commercial Development. (*Id.*).
14

15 13. Despite a history of negotiations and cooperation between Movants'
16 representatives Mssrs. Brett Seabert and Kreg Rowe and counsel for the Trust,
17 none of the Movants were notified that records related to Movants were the
18 subject of a Subpoena in Nevada nor were courtesy copies provided to the
19 Movants' counsel. (*Id.*).
20

21 14. After Movants learned of the subpoenas Movants offered to meet
22 with the Trust representatives to discuss any known transfers of funds from
23 USACM or the Diversified Trust Deed Fund into the subject bank accounts and
24

25 ⁷ USAIP did not seek the subpoenas. The subpoenas are an attempt to exercise control over
USAIP's assets, and such conduct is stayed by 11 U.S.C. Section 362.

26 ⁸ Only two currently have loans outstanding: Cabernet Highlands, LLC and Tanamera
27 Commercial Development, LLC (*Id.*). However, Tanamera Commercial Development, LLC has
28 been informed that its loan was transferred to USAIP. (Ex. C).

1 provide records. This response was met with silence. Instead, the Trust
2 representatives sent a letter to one or more of the banks purporting to “modify”
3 their subpoena. The proposed unilateral modification does not remove the force
4 of the subpoenas and it requires the Banks to determine in which of the
5 accounts USACM, the Diversified Trust Deed Fund or USAIP has an interest or
6 is “manager”. A true and correct copy of a sample letter is attached hereto as
7 Exhibit “E”. Following further attempts to resolve their disputes the Trust
8 unilaterally filed the April 26 Motions against the Individuals. Upon information
9 and belief the Trust continues to file Motions for Rule 2004 exams relating to
10 Movants.
11

12 II. LEGAL ARGUMENT

13 A. Standard For Review Of A Motion To Quash 2004 Examinations.

14
15 15. Movants seek an order quashing the Rule 2004 examination
16 subpoenas because: (1) such motions and subpoenas are not proper after the
17 USACM plan of reorganization has been confirmed and all of the Debtors’ assets
18 have been transferred to the Trust; (2) such discovery would be beyond the
19 scope of a 2004 examination even if the USACM case were still a Chapter 11
20 because it bears no apparent relationship to property that was once owned by the
21 Debtors other than premature post-judgment discovery; (3) the Movant’s
22 personal, confidential financial records have no relation to the Debtors or this
23 bankruptcy proceeding; (4) Rowe and Seabert are not the proper persons to
24 subpoena for the corporate records of 188 entities – the Trust must subpoena
25 the entities and their custodians of records; (5) the subpoenas are abusive and
26 harassing; (6) the Rule 2004 motions filed by the Trust were improper and the
27 subpoenas issued do not accurately reflect the information sought and ordered
28 by the Court; and (6) the Movants’ interest in the privacy of their financial

1 records far exceeds the Trust's need for this information. See Fed. R. Bankr. P.
2 2004; Fed. R. Civ. P. 45(c). Thus, the motion to quash should be granted.

3 16. In the context of a Rule 2004 examination, once a motion to quash
4 has been filed, the burden is placed in the examiner to prove that "good cause
5 exists" for taking the required discovery. *In re Dinubilo*, 177 B.R. 932, 943
6 (Bankr.E.D. Cal. 1993). "Good cause" may be established if the party seeking the
7 examination can show that it is "necessary" or that denial of the subpoena will
8 cause the examiner undue hardship or injustice. *Id.* Here, there is no good
9 cause.

10 B. The 2004 Examinations Are Not A Proper Exercise Of Post-
11 Confirmation Jurisdiction

12 17. The administration of the Debtors' bankruptcy cases concluded on
13 January 8, 2007 when the Debtors' joint plan was confirmed by the Court. The
14 estate assets were vested in the various post-confirmation entities. It is not
15 clear for what purpose the Trust seeks to use the subpoenaed information.
16 However, given the overly broad scope of the subpoenas and the massive net
17 cast over the various entities and individuals, it can only be presumed that the
18 intended purpose of obtaining this information is to obtain inappropriate pre-
19 litigation discovery.

20 18. This purpose is not proper. Long ago, the court in Good Hope
21 Refineries noted:

22 "Rule 205 [precursor to Rule 2004] is intended to provide the Trustee,
23 generally new to the case, with a very broad discovery device to aid in an
24 efficient and expeditious ingathering of all of the pertinent facts necessary in the
25 effective administration of the estates.

26 It is not intended to give the rehabilitated debtor post confirmation a
27 strategic advantage in fishing for potential private litigation. Our basic concept
28 of fair play expressed in the constitutional legalese of equal protection and due
process should require all litigants to use the same discovery and procedural
rules when not directly engaged in those activities that call for the bankruptcy
umbrella, namely, that collection of activities characterized as the
administration of the estate." *In re Good Hope Refineries, Inc.*, 9 B.R. 421, 423

1 (Bankr.D.Mass.1981); In re GHR Energy Corp., 35 B.R. 534, 537
2 (Bankr.D.Mass.1983).

3 19. Since enactment of the new bankruptcy rules, courts have
4 continued to hold that examinations of matters having no relationship to the
5 bankrupt's affairs or the administration of the estate are improper. *Keene Corp.*
6 *v. Johns-Manville Corp.*, 42 B.R. 362, 364 (Bankr.S.D.N.Y. 1984); *Dinublio*, 177
7 B.R. at 940.

8 20. If the Rule 2004 examination is attempted post-confirmation, as is
9 the case here, the examination is restricted to the administration of the case
10 post-confirmation – that is to say limited to issues which court at that time still
11 has power to entertain. *Cinderella Clothing Industries*, 93 B.R. 373 (Bkrtcy E.D.
12 Pa. 1988)

13 21. The 2004 Motions did not even address this requirement. Moreover,
14 the Motions could not meet this requirement because the matters which are the
15 subject of the Motions deal with assets belonging to the Trust not to the estate.

16 22. There admittedly exists a residue, albeit limited, of court authority
17 over a confirmed chapter 11 case. Courts have recognized the competing
18 interests between retaining jurisdiction after confirmation until entry of the final
19 decree (see Bankr.R. 3020), and ending the 'tutelage' status of reorganization.
20 There is no doubt that the bankruptcy court's jurisdiction continues post
21 confirmation to "protect its confirmation decree, to prevent interference with the
22 execution of the plan and to aid otherwise in its operation." *Id.*, quoting *In re*
23 *Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir.1966). See also
24 11 U.S.C. § 1142.

25 23. The proposed examinations do not serve this purpose. Rather – they
26 seek to use a bankruptcy estate's powers to quickly ascertain the estate's assets
27 and liabilities for the benefit of the post-confirmation Trust. There is no legal
28

1 basis for this attempt.

2 24. The court does not have jurisdiction over post-confirmation
3 controversies, even when the basis for those controversies may have been
4 covered in a plan of reorganization. *In re J.T. Gerken Trucking, Inc.*, 10 B.R. 203,
5 204 (Bankr.N.D.Ohio 1981), the court concluded that "affirmation of the
6 [collective bargaining] agreement in the plan does not confer jurisdiction upon
7 the [bankruptcy] court over post confirmation controversies. A confirming
8 court's jurisdiction is limited to matters concerning the operation of the plan."
9 See also *Hall's Motor Transit*, 889 F.2d 520,522 (3rd Cir. 1989). ("The bankruptcy
10 court's jurisdiction does not follow the property, but rather, it lapses when the
11 property leaves the estate.").

12 25. Similarly, in *In re Express One International, Inc.*, 217 B.R. 215, 216-
13 17 (Bankr.E.D.Tx.1998)a creditor, which had filed pending administrative claim
14 seeking payment for postpetition maintenance work it performed on the Chapter
15 11 debtor-in-possession's aircraft, filed a motion for order allowing
16 postconfirmation Rule 2004 examination of the debtor and for production of
17 documents. The Bankruptcy Court examined the scope of Rule 2004 after plan
18 confirmation and held that the examination would be limited in scope to the
19 single issue of whether the debtor was setting funds aside to pay creditor's
20 administrative claim, should creditor ultimately prevail on its claim. (instructing
21 that in a post-confirmation situation, Rule 2004 examination is limited to
22 matters relating to the administration of the case).

23 C. The Trust Failed To Specify the Scope and Nature of the
24 Examination

25 26. The 2004 Motions fail to state how the matters sought relate to
26 post-confirmation jurisdiction. Persons seeking Rule 2004 examinations must
27 specify the scope and nature of the examination. *Enron*, 281 B.R. at 840. See
28 Fed. R. Bankr. P. 9013 requires that a motion shall state with particularity the

1 grounds therefore, and shall set forth the relief or order sought.

2 27. The Rule 2004 examinations and related subpoenas violate each of
3 these restrictions. In addition, there is little doubt that the financial privacy
4 interests of the various Movant entities and individuals far outweighs any
5 minimal need for the information sought. Therefore, the Trust cannot meet its
6 burden of establishing "good cause" and the subpoenas must be quashed.

7
8 D. The Discovery Requested Is Sought For The Purpose Of Abuse And Harassment.

9 28. Given the extreme overbreadth of these subpoenas, there is little
10 question that an additional purpose of this discovery is to abuse and harass the
11 Movants and their banks – not to seek relevant information concerning the
12 Debtors or the post-confirmation bankruptcy estate. The abusive and harassing
13 nature of these subpoenas is evidenced by the sheer volume of the information
14 sought which includes *all documents and information* regarding *any account* held
15 at *any time* at *any* of the subject banks or financial institutions **personal and**
16 **private banking information of fifty Movant entities and individuals**, the
17 vast majority of which have had no involvement with USACM. (See Ex. A). These
18 subpoenas specifically seek ninety-three (93) categories of documents and
19 information that range from a variety of items for all of these entities and
20 individuals – without any limitation to the relevancy of the information to the
21 particular entity or individual. (*Id.*). The effect of the subpoenas may well be to
22 damage the relationship of the Movant entities and individuals with their
23 lenders.

24 29. Moreover, these requests are made for a period of time beginning in
25 January 1997 to the present -- again without any attempt to define or limit the
26 information sought to relevant entities, individuals or information. The abusive
27 nature of these subpoenas does not stop there but is further buttressed by the
28

1 definitions provided for the subpoenaed entities' compliance. As just one
 2 example, "documents" being defined in the subpoenas as:

3 All originals, drafts, modifications of originals, of written, printed,
 4 typed, graphic, recorded, and visually or orally produced material
 5 of any kind, whether or not privileged, and includes but is not
 6 limited to, correspondence, business records, telephone records
 7 and notations, diaries, calendars, minutes, contracts, agreements,
 8 orders, receipts, invoices, bills, pictures, drawings, or sketches,
 9 blueprints, designs, notebooks, advertising, and commercial
 10 literature, promotional literature, of any kind, cables, telexes,
 11 telegrams, recordings, patents, lists, charts, pamphlets,
 12 appendices, exhibits, summaries, outlines, logs, journals,
 13 agreements, work papers, statements, records of inventory,
 14 financial and/or accounting records, catalogues, trade journals,
 and other documented or recorded information. The term
 "document" also includes every other manner by which
 information was recorded or transmitted, including but no limited
 to, microfilms, punch cards, disks, tapes, computer programs,
 printouts, all recordings made through data processing equipment
 to obtain the information recorded by that method. The term
 "document" refers to copies, duplicates, and/or counterparts only
 where (i) the copy, duplicate, or counterpart is not exactly identical
 to the original or (ii) your records only contain a copy, duplicate, or
 counterpart of the original and not the original itself.

15 (See Ex. A, pp. 1-2.)

16 30. The abusive and harassing nature of these subpoenas is fully
 17 apparent from the lengthy, confusing and overly inclusive definitions and
 18 requests provided by the Trust. Finally, it goes without saying that the time,
 19 effort and manpower necessary to comply with such improper subpoenas would
 20 be enormous and onerous. In short, these subpoenas go far beyond even a
 21 typical Rule 2004 "fishing expedition."

22 Instead [the Committee] using rod and reel, or even a reasonably
 23 sized net, [the Committee] would drain the pond and collect the fish
 24 from the bottom. This exercise goes beyond the bounds set by the
 discovery rules.

25 *In Re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 42-43
 26 (Bankr.C.D. Cal. 1977). In fact, it seems that the Trust seeks to drain an ocean,
 27 to find *possible* fish at the bottom of the sea. This can hardly be seen as
 28 anything short of abusive and harassing.

1 E. The Motions Filed by the Trust Were Improper and The Subpoenas
 2 Seek Information Not Requested Or Stated In Those Improper Motions.

3 31. Even if such a motion were proper, a Rule 2004 examination may
 4 only be taken after a proper motion is filed and granted by the court. Fed. R.
 5 Bankr. P. 2004(a). The motion must state with particularity "the grounds for the
 6 motion" and "set forth the relief sought." Fed. R. Bankr. P. 9013. Thus, at a
 7 minimum, a motion for a Rule 2004 examination must specify the scope and
 8 nature of the examination requested. See Collier on Bankruptcy, ¶ 2004.01[2]
 9 (15th Ed. 2006). These basic requirements were not met.

10 32. The Trust's motions fail to meet this requirement. The Motions are
 11 misleading in what they seek. In all but one of the Bank motions, the Trust
 12 simply states as that: "The [Trust] seeks information concerning *legal services*
 13 performed by BofA on behalf of USACM, the other debtors in the above-
 14 captioned cases" (See Ex. B at p. 2:10-12) (emphasis added). Besides the
 15 general statement seeking information about the legal services provided to
 16 debtors allegedly by these institutions, there is no explanation by the Trust as to
 17 how the information sought is relevant or reasonably related to the debtors or
 18 the bankruptcy, much less to the post-confirmation administration of the estate;
 19 how the information will be gathered, what information will be requested and
 20 what, if any, private or confidential information from third parties may be
 21 implicated. In fact, the Trust did not even attach a draft subpoena to any one of
 22 these motions. Had the Trust done so – it would have revealed what the Trust
 23 was actually seeking -- substantial confidential, private financial information of
 24 a multiple different entities and individuals spanning over a decade.⁹

25 33. Worse still, although the Trust's moving papers sought only

26 ⁹ In total, these overbroad subpoenas sought private, confidential financial information
 27 concerning over **188 different companies/entities** and **36 different individuals** via **93**
 28 **separate requests** for information. Of those fifty-one represent the Movants.

1 “information concerning *legal services* performed” by the various banks and
 2 financial institutions (*Id.*) the subpoenas issued did not seek any documents or
 3 information pertaining to “legal services.” (Ex. A). Rather, these subpoenas seek
 4 an excessively large amount of financial information, including banking account
 5 information, private financial account information from individuals and other
 6 like information – which has nothing to do with rendering “legal services.” For
 7 example, the requests seek “documents and evidence of any and all accounts” at
 8 the various banks or documents in the name or for the benefit of the various
 9 movant entities and individuals and so on. (See Ex. A, p. 13 ¶¶ 2-3). Therefore,
 10 as the Trust was granted information to conduct a Rule 2004 examination of
 11 these various entities to determine the “legal services” provided to the debtors,
 12 the attempt by the Trust to obtain information never requested from the Court is
 13 highly improper. Accordingly, the subpoenas issued are procedurally defective
 14 and must be quashed.

15 F. Rowe and Seabert Are Not Corporate Representatives

16 34. The Motions for Seabert and Rowe are similarly misleading. The
 17 subpoenas disclose that the Trust seeks to examine Seabert and Rowe as
 18 corporate representatives – not as individuals. The Motions contain no such
 19 disclosure. The Individual motions are a thinly-veiled attempt to avoid paying
 20 for 188 corporations to be examined. There is no legal basis for permitting
 21 Movants to avoid paying proper costs and expenses associated with discovery.

22 G. The Movants’ Interests In Privacy Outweighs The Trust’s Need For
 23 The Discovery Sought.

24 35. Finally, in determining whether the Trust has established “good
 25 cause” as required under Rule 2004, the Court must weigh the competing
 26 interests of the parties. *In Re Drexel Burnham Lambert Group, Inc.*, 123
 27 B.R. 702, 712 (Bankr.S.D.N.Y. 1991). Thus, the Court must weigh the need
 28 for the requested discovery against the interests of the party seeking to protect

1 the information. *Id.*

2 36. Here, the Trust cannot provide any legitimate, good cause basis for
3 the relevancy or the need of the requested information. As detailed above, the
4 information sought and the manner in which it was requested, establishes that
5 there is little, if any, relationship between Movants and the Debtors or the
6 bankruptcy proceedings at issue.

7 37. The information sought from the Banks is personal, confidential
8 financial information of the Movants. The Movants have legitimate privacy
9 interests in their personal, confidential financial information. *See e.g., Whalen v.*
10 *Roe*, 429 U.S. 589 589 (1977) (recognizing fundamental constitutional right to
11 privacy includes a right to informational privacy). This legitimate interest of
12 privacy in one's financial information is supported by the overwhelming number
13 of laws which specifically protect these vary privacy interests. *See e.g.* 18 U.S.C.
14 § 1693, 1693m (Electronic Funds Transfer Act); 15 U.S.C. ¶ 1681 *et. seq.* (Fair
15 Credit Reporting Act); 5 U.S.C. ¶ 552 (Freedom of Information Act); 15 U.S.C. §
16 6801 *et. seq.* (Gramm-Leach-Bliley Act); 5 U.S.C. § 552a (Privacy Act); 12 U.S.C.
17 § 3401 *et. seq.* (Right to Financial Privacy Act).

18 38. Thus, on balance, there is little question that the privacy interests of
19 the Movants in their personal, confidential information far outweighs the
20 interests of the Trust in collecting this irrelevant information.

21 39. In sum, the Trust cannot establish the required "good cause" to
22 overcome this motion to quash for all of the reasons listed above.

23 H. Movants Are Entitled To A Protective Order.

24 40. Even if this Court disagrees, Movants request that the Court enter a
25 protective order limiting the information sought pursuant to the Trust's requests
26 and entry of an order sealing the personal, confidential financial information
27 and documents received by the Trust. Fed. R. Bankr. P. 9018.

28 41. The Court may "make an order which justice requires (1) to protect

1 the estate or any entity in respect of a trade secret or other confidential
2 research, development, or commercial information.” Fed. R. Bankr. P. 9018; see
3 also *In re Drexel Burnham Lambert Group, Inc.* 123 B.R. 702, *711-
4 712 (Bankr.S.D.N.Y. 1991) (explaining that a Rule 2004 fishing expedition “can
5 net the dolphins as well as the tuna; however, the net, in the discretion of the
6 Court, can be carefully stitched to limit its catch.”).

7 42. Before, this Court permits the unlimited discovery via these
8 subpoenas, the Movants request that this Court require the Trust to limit their
9 search to only those entities and individuals that may have some relevant
10 information concerning the debtor and/or the bankruptcy proceeding. See
11 *Dinublio*, 177 B.R. at 940 (instructing that, “Third parties subject to examination
12 pursuant to Rule 2004 are ‘only [] those persons possessing knowledge of the
13 debtor’s acts, conduct or financial affairs so far as this relates to a debtor’s
14 proceeding in bankruptcy.”). Movants further request that the Trust be required
15 to make a showing or offer of proof that there is a financial link between the
16 Debtors and the Movants’ personal financial records.

17 43. Finally, to the extent that the Court permits the information
18 subpoenaed to be provided to the Trust, the Movants request that the Court
19 enter an order compensating Movants for the enormous expense involved in
20 complying with the subpoenas and sealing the personal, confidential financial
21 information of Movants from the public record and forbidding the Trust from
22 sharing or exposing the information to any third party without first obtaining
23 court approval. Recall, the information requested is “commercial information.”
24 See Fed. R. Bankr. P. 9018. If this information exposed, this private,
25 confidential information would be the subject of the perusal by individuals and
26 entities having no basis or need for such information and who could use the
27 information improper uses – such as identity theft. Moreover, this personal,
28 confidential financial information could be used by Movants’ competitors.

1 44. Thus, at a minimum, Movants request a protective order: (1)
2 limiting the scope of the information that may be requested to only those entities
3 and individuals that have relevant information that bears some rational
4 relationship to the debtors and/or the bankruptcy upon a proper offer of proof;
5 and (2) compensating Movants for the cost and expense of compliance and (3)
6 sealing the personal, confidential financial information of the Movants from the
7 public record and requiring the Trust to obtain court approval before revealing
8 this information to third parties.

9 III. CONCLUSION

10 45. Movants respectfully request that the Court grant their Motion to
11 Quash the Subpoenas in its entirety prohibiting the Trust from obtaining
12 personal, confidential financial documents and records from the Banks. In the
13 alternative, Movants request that the Court enter a protective order limiting the
14 information that may be obtained by the Trust and sealing that information from
15 the public record and from disclosure to third parties.

16 DATED: May 11, 2007 MCDONALD CARANO WILSON, LLP

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